

# Mara Salvatrucha (MS-13) and Ley Anti Mara: El Salvador's Struggle to Reclaim Social Order\*

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*They hijacked buses for drive-by shootings in rivals' neighborhoods, and began raping local girls, some as young as six. . . .Homeboys, high on crack, raped and killed a young teenage girl and her mother, hacking their breasts off. . .the general feeling here is that the only way to deal with the gangs is to kill them all.*<sup>1</sup>

## I. INTRODUCTION

On October 10, 2003 El Salvador enacted Ley Anti Mara (LAM-1).<sup>2</sup> LAM-1 is a temporary and controversial law that aims to curtail the violent activities of Mara Salvatrucha (MS-13), North and Central America's most notorious transnational street gang.<sup>3</sup> There is neither a single explanation, nor one nation to blame for the origin of Salvadorian-American gangs. Rather, they are a truly international social phenomenon rooted in El Salvador's history of violence and persistent poverty, and the crime and marginalization that these human beings experience as an urban subculture in the United States of America.<sup>4</sup>

In the early 1980s, American subculture, marred by drugs, violence, and poverty, threatened the life and culture of Salvadorian refugees. In these *barrios* that lack adequate police protection, Salvadorians were left to defend themselves. Gangs offered a means of self-protection, but with it came violent activity, ranging from initiation crimes to extortion and murder. Upon the conviction of a deportable crime, many Salvadorians face deportation.<sup>5</sup> America's current policy is to enforce its laws, incarcerate

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1. Tim McGirk, *Gang-Bangers: A Deadly U.S. Export*, TIME MAGAZINE (online ed.), <http://www.time.com/time/nation/article/0,8599,59613,00.html> (last visited July 8, 2005).

2. Decreto No. 158, *Diario Oficial de la República*, Vol. 361, No. 188, pp.2–10, Oct. 10, 2003, available at <http://archivodigital.gobernacion.gob.sv/DiarioOficial> (last visited July 26, 2005) [hereinafter LAM-1]. LAM-1 is also known as “Plan Mano Dura” (Firm Hand Plan).

3. LAM-1 was meant to apply for a period of 180 days. *Id.* art. 49. Mara Salvatrucha and 18th Street, archrivals, are the two largest U.S. based Salvadorian gangs.

4. Any reference to the United States of America or its people will hereinafter be referred to as America, American, or U.S.

5. An alien is deportable if he or she commits a crime of moral turpitude or an aggravated felony. An alien can also be deported for violation of any drug law where he or she is found carrying more than 30 grams of marijuana. 8 U.S.C. § 1227(a)(2).

the criminals, and then deport them to El Salvador. In doing so, the United States abandons its responsibility to fight gangs. Rather, the burden is effectively transplanted to El Salvador, a nation that now suffers from a plague of violent crime.<sup>6</sup> In the ten month period between July 1998 and May 1999, the Fiscalía General (Attorney General's Office) reported 3,875 homicides,<sup>7</sup> of which approximately one-third occurred in San Salvador.<sup>8</sup> As a response, El Salvador enacted LAM-1.

Ley Anti Mara caused a legal tug of war. LAM-1 criminalizes *membership* in gangs by making them unlawful associations.<sup>9</sup> It fails to establish a minimum age under which a child gang member is immune from the law and allows a judge to determine whether a child should be tried as an adult.<sup>10</sup> Constitutional and International legal arguments against LAM-1 were presented before El Salvador's Supreme Court, which ultimately held LAM-1 unconstitutional.<sup>11</sup> In response, the legislature ratified a new Ley Anti Mara (LAM-2).<sup>12</sup> Though LAM-2 is strikingly similar to LAM-1, the Supreme Court must hear a new case to determine its constitutionality. This legal chess match is just one example that demonstrates El Salvador's inability to unilaterally combat transnational gangs.

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6. Some government officials partly blame the problem of violence in El Salvador on the deportation of over 12,000 Salvadorians with criminal records since 1998. Chris Kraul, *El Salvador Comes to Grips with Gangs; Deportees from U.S. feed the violence of groups targeted in public crackdown*, L.A. TIMES, Dec. 17, 2004, at A1 [hereinafter Chris Kraul].

7. Authorities estimate that 70% of homicides are committed by gang members. *Saca se anota victoria con ley antipandillas enviada al Congreso salvadoreño*, AGENCE FRANCE PRESSE, July 22, 2004 [hereinafter *Saca se anota victoria*].

8. Exactly 1,122 of the homicides accounted for in the ten month period occurred in the Capital City of San Salvador. Fiscalía General de la República, *available at* <http://www.uca.edu.sv/publica/iudop/2000/boletin4/graph2.htm> (last visited July 26, 2005).

9. LAM-1, *supra* note 2, art.1(1).

10. *Id.* art. 2(5) & 2(3).

11. Corte Suprema de Justicia, *Diario Oficial de la República*, Vol. 363, No. 70, 181-324, Apr. 19, 2004, *available at* <http://archivodigital.gobernacion.gob.sv/DiarioOficial> (last visited July 26, 2005) [hereinafter Corte Suprema].

12. The official name is "Law to Combat the Delinquent Activity of Special Unlawful Groups or Associations." Decreto No. 305, *Diario Oficial de la República*, Vol. 363, No. 65, 3-7, Apr. 2, 2004, *available at* <http://archivodigital.gobernacion.gob.sv/DiarioOficial> (last visited July 26, 2005) [hereinafter LAM-2].

MS-13 poses a threat to both Salvadorians and Americans.<sup>13</sup> It is a gang that must be cooperatively contained; it will not be controlled by a simplistic burden-shifting policy that leaves El Salvador, a developing country, to unilaterally deal with the problem. This paper will argue that: (1) the deportation of gang members, which results in the arbitrary deaths of thousands of innocent Salvadorians who have no legal recourse amounts to a grave violation of human rights; (2) deportation of gang members to a society where they are likely to be killed by vigilante death squads, or in prison fires and riots, amounts to an unjustifiable, but necessary, violation of human rights as El Salvador *unilaterally* deals with a *Salvadorian-American* phenomenon; (3) El Salvador, in addition to Ley Anti Mara, should enact programs and economic policies to address the root causes of gang membership, including the disintegrated Salvadorian family structure, persistently high poverty rates, and the absence of meaningful economic opportunities; and (4) in the interest of hemispheric and national security, and to mitigate the unjustifiable, but necessary violation of human rights, the United States should stop its deportation policy and instead provide financial assistance and law enforcement training to El Salvador.

## II. BACKGROUND: THE ORIGIN OF SALVADORIAN STREET GANGS

The origin of MS-13 cannot be attributed to a single factor, or solely blamed on either El Salvador or the United States. Instead, its origin can be understood as a combination of two factors. First, most Salvadorian-Americans fled their country during a violent time. Violence in El Salvador is cyclical and manifests itself in various forms; it is part of the oppressed people's history, and unfortunately, their culture. Second, these traumatized Salvadorian people settled in the marginalized, lower income minority communities of Los Angeles. These neighborhoods were already plagued by gangs, drugs, and crime. This Angelino subculture induced Salvadorians, who were often the victims of violent and senseless crime, to protect themselves by adapting to this violent lifestyle.

### A. *The Salvadorian People: A Culture of Violence*

On March 24, 1980, the assassination of Monseñor (Archbishop) Romero, who argued for the amelioration of economic and social conditions of the

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13. See generally Priya Abraham et al., *Criminals next door, COVER STORY: What's the nation's biggest domestic threat? Salvadoran-inspired gang violence is heating up—and it may be coming to a town near you*, WORLD MAGAZINE, June 18, 2005, available at <http://www.worldmag.com/displayarticle.cfm?id=10733> [hereinafter WORLD MAGAZINE].

poor,<sup>14</sup> sparked the beginning of a bloody civil war. The left and right wings of the government, respectively, used guerilla fighters and national armed forces to fight for twelve bloody years.<sup>15</sup> Children who had not yet fully learned to read and write were recruited to fight in the war by the Salvadorian army.<sup>16</sup> Salvadorians had two options: seek refuge in the United States or continue fighting to their deaths. Seventy-five thousand fought and perished. Nearly one million people (then representing twenty percent of El Salvador's population) grew tired of the endless violence and sought refuge in foreign countries.<sup>17</sup> Ultimately, these events led to the disintegration of the Salvadorian family structure. Memoirs of grenade blasts, massacres, and mutilated family members troubled El Salvador's youth. Many came to the United States knowing how to operate American made assault rifles, but not knowing how to read or write Spanish. Over fifty-two percent of Salvadorian refugees in the United States settled into the Pico-Union district of West downtown Los Angeles.<sup>18</sup>

Mara Salvatrucha and 18th Street, the two most dangerous transnational gangs, were created in the Pico-Union district.<sup>19</sup> The Los Angeles Police

14. Considered to be El Salvador's greatest martyr yet condemned by the right-wing as a subversive, Romero, in one of his many inspiring homilies said,

In Latin America, a sinful situation exists. Injustice has practically become normal and it is necessary that we Christians work to transform this situation of sin. Christians should not tolerate the reign of the enemy of God—sin. Christians have to work so that sin will be marginalized and the reign of God will prevail. To work for this is not communism. To work for this is not to become involved in politics. It is simply a gospel that demands of men and women, today's Christians, a greater commitment to history.

SALVANET, Mar.–Apr. 2000, at 8, <http://www.crispaz.org/news/snet/2000/0200.pdf> (Crispaz, or "Christians for Peace", is an organization that seeks peace, justice, and human liberation of the poor and marginalized community).

15. The civil war started in 1980 and officially ended in 1992. During these twelve years over 75,000 Salvadorians fell victim to the war. CIA WORLD FACTBOOK, available at <http://www.cia.gov/cia/publications/factbook/> (last visited July 26, 2005) [hereinafter CIA FACTBOOK].

16. The government recruited children as young as twelve years old, often times picking them out of their classroom seats. For a big screen version of the reality of child soldiers during the Salvadorian conflict, see VOCES INOCENTES (INNOCENT VOICES) (20th Century Fox 2005), available at <http://www.vocesinocentes.com/flash-es.html>.

17. Between 1980 and 1990 it is estimated that one million people left El Salvador. Central American Resource Center, <http://www.carecen-la.org> (last visited July 26, 2005).

18. *Id.* In 1980 it is estimated that 30,000 Salvadorians resided in Los Angeles. By 1990 the Salvadorian population mushroomed to over 300,000, representing a 1,000% increase.

19. *Community Police Advisory Boards*, June 17, 2004, [http://www.lapdonline.org/get\\_involved/community\\_policing.cpab/cpab\\_minutes\\_07.htm](http://www.lapdonline.org/get_involved/community_policing.cpab/cpab_minutes_07.htm) (last visited Sept. 9, 2004).

Department states that these gangs are predominantly comprised of refugees who experienced violent childhoods, war, breakup of families, and abject poverty.<sup>20</sup> Upon being captured or convicted of a crime, these refugee children now turned gang members are deported to a foreign land: their birthplace, the original battleground, El Salvador.<sup>21</sup>

*B. Forgive me Mother for this Crazy Life I Lead:<sup>22</sup>  
Los Angeles' Street Gang Subculture*

Mexican-American street gangs came into existence in the early 1900s as a result of poverty, prejudice, and racism.<sup>23</sup> Although Mexicans that lived in the United States at that time were U.S. citizens, many felt that they belonged to a subculture of second rate citizens.<sup>24</sup> Rapidly growing Mexican-American communities were often some of the poorest in Los Angeles and only offered meager economic opportunities.<sup>25</sup>

Subculture conditions persisted into the 1940s when the Maravilla housing project gangs formed.<sup>26</sup> Eventually, rivalries over gangs, women, and turf spawned between people living in different housing projects.<sup>27</sup>

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20. The Los Angeles Police Department states that most members of Mara Salvatrucha and 18th Street come from El Salvador and that they have past experience as guerilla or military combatants. *Id.*

21. Salvadorian deportees feel like foreigners in El Salvador. José Amaya was deported after completing a two year jail sentence for drug dealing. Prior to deportation, he lived 19 of his 20 years of life in California. When asked about El Salvador, José said, "I don't like it here. All my life is in L.A. My family is there. My money is better there. I got enemies here." Similarly, Carlos lived in Hollywood since the age of six. At 19, he was deported for selling cocaine. Carlos felt lost when he found himself back in El Salvador. He plans to return to his home, California, legally or illegally. Tracy Wilkinson, *Gangs Find Fresh Turf in Salvador; whether by choice or by force, many L.A. youths have returned to their homeland bringing with them violent subculture*, L.A. TIMES, June 16, 1994, at A1.

22. *Mi Vida Loca* (My Crazy Life) and *Perdóname Mi Madre* (Forgive me Mother) are popular gang culture tattoos. The phrases are symbolic of the gang members' awareness of the gangster lifestyle and the disapproval of their family. They are often tattooed in Old English script. Sgt. Louis Savelli, *East Coast Mexican Gangs*, at [http://www.nagia.org/east\\_coast\\_mexican\\_gangs.htm](http://www.nagia.org/east_coast_mexican_gangs.htm) (2000, last modified Apr. 12, 2005) [hereinafter *East Coast Gangs*].

23. Poverty, prejudice, and racism are conditions precedent to the formation of most street gangs. Al Valdez, *A History of California's Hispanic Gangs*, [http://www.nagia.org/Hispanic\\_Gangs.htm](http://www.nagia.org/Hispanic_Gangs.htm) (1998, last modified Apr. 12, 2005) [hereinafter *History of California's Hispanic Gangs*].

24. *Id.* Mexican-Americans living in Los Angeles felt displaced. Many were treated as second class citizens by white Americans and often told to go back to their homes in Mexico, even though many had been living in California before most white Americans.

25. *Id.*

26. *Id.*

27. *Id.* Claiming and protecting turf, or territory, are compliments to each other. This practice rapidly became the accepted practice of street gangs.

These small gangs eventually culminated in "La Eme," the Mexican Mafia, an organization primarily made up of Southern California residents.<sup>28</sup> The Mexican Mafia, in what may be considered a rather asinine incident, became rivals with "Nuestra Familia" (Our Family), a gang primarily composed of Northern California residents.

An "Eme" member nicknamed "Pieface" (foot face) shared a cell with Hector Padilla, an inmate from Northern California. Padilla cared for his shoes and shined them daily. One day, "Pieface" stole Padilla's shoes, only to find out that they were too small for his feet. "Pieface" decided to give the shoes to Salas, a higher ranking member of "La Eme"; Salas accepted the shoes. "Pieface" went back to his cell where he found Padilla frantically looking for his shoes. Later, Padilla saw Salas wearing the shoes and accused him of stealing them. A fight started. Padilla was stabbed and killed during the fight. Word of the incident spread and "Nuestra Familia" was formed in order to protect the Northerners from the Southerners.<sup>29</sup>

It was into this barbaric, rivalry-filled, and hostile environment that Salvadorians assimilated into during the 1980s. Salvadorians were not quickly accepted in the Mexican-American neighborhoods of the "Rampart" district of Los Angeles.<sup>30</sup> They were frequently targeted and victimized by local Hispanic gangs.<sup>31</sup> Thus, as a mode of protection, Salvadorian refugees formed what is now considered one of the most dangerous gangs in the United States.<sup>32</sup> Though at first it was only a Salvadorian

28. "La Eme" was the first prison gang in California. It was formed for protection from prison guards and other inmates. *Id.* For a Hollywood retelling, inspired by a true story of the history of the Mexican Mafia and the daily violence that takes place in a rather occult sector of Los Angeles and California prisons, see *AMERICAN ME* (Universal Studios 1992).

29. *History of California's Hispanic Gangs*, *supra* note 23. There are other versions of the story that say Salas and Padilla were roommates, and that the shoes actually did belong to Salas. Nevertheless, the end result is the same: the death of Padilla and the formation of Nuestra Familia. *Id.*

30. Al Valdez, *A South American Import*, [http://www.nagia.org/mara\\_salvatrucha.htm](http://www.nagia.org/mara_salvatrucha.htm) (last visited July 28, 2005) [hereinafter *South American Import*]. Given the tendency of gangs to become rivals due to their country or region of origin, it is essential to correct the title of Al Valdez' article. Mara Salvatrucha is not a South American import, but rather a gang primarily composed of Central Americans that originated in Los Angeles in the mid 1980s. In fact, the Los Angeles Police Department states that it was formed less than one mile east of the high rises in Downtown L.A. close to 6th Street and Los Angeles Street around 1985, and that, as a result of deportation, gang cells are now established in Central America. *Community Police Advisory Boards*, *supra* note 19.

31. *South American Import*, *supra* note 30.

32. Protection from well established Mexican-American gangs is frequently cited as the reason why Salvadorians formed Mara Salvatrucha. Rich Connell & Robert J.

gang, MS-13 currently has members from Ecuador, Guatemala, Honduras, and Mexico, as well as a few African-American members.<sup>33</sup> Mara Salvatrucha has quickly developed a reputation for being extremely organized and violent.<sup>34</sup>

### III. THE SEVERITY OF TRANSNATIONAL STREET GANG PROLIFERATION

The current gang problem can only be understood when it is observed from a transnational perspective. First, it is essential to understand the lawlessness of these gang members in the country where they originated: the United States. Second, it is essential to investigate and analyze the effect of deportation on Salvadorian society. Lastly, in order to understand the severity of the crisis, it is essential to juxtapose El Salvador's homicide rates against those of major U.S. cities.

#### *A. Mara Salvatrucha in the United States*

Mara Salvatrucha originated as a local and typical street gang in Los Angeles. Shortly thereafter, it developed into a complex and extremely organized web of gangsters. It is now one of the largest and most ruthless gangs in California.<sup>35</sup> Further, MS-13 also has cells in thirty-three states across the country.<sup>36</sup> The concern over MS-13 has led to the creation of a federal task force whose purpose is to combat and control the gang.<sup>37</sup>

Gang control will be a difficult task. MS-13 members have committed crimes such as burglary, car theft, drug sales, home invasion robbery, weapons smuggling, car jacking, extortion, illegal firearm sales, aggravated assault, rape, and murder.<sup>38</sup> Mara Salvatrucha is also responsible for killing three federal agents and shooting numerous law enforcement officers

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López, *Gang Sweeps Result in 103 Arrests; In a nationwide action, authorities round up members of MS 13, formed in L.A. and now involved in smuggling, trafficking and murder*, L.A. TIMES (ORANGE COUNTY ED.), Mar. 15, 2005, at B1 [hereinafter *Gang Crackdown*]; see also *South American Import*, *supra* note 30.

33. *South American Import*, *supra* note 30. The fact that some members are African-American or U.S. born Latino's assures Mara Salvatrucha's permanency in the United States.

34. *Id.*

35. *Gang Crackdown*, *supra* note 32.

36. *Id.* MS-13 has thoroughly settled into America. It may be found in California, Washington, DC, Texas, Nevada, New York, Illinois, and even Alaska and Utah. *South American Import*, *supra* note 30.

37. *Gang Crackdown*, *supra* note 32. Racketeer Influenced and Corrupt Organizations Act (RICO) and a similar task force was created to combat the Italian Mafia. Thus, MS-13 is no longer a loosely knit group of teenagers looking for protection. They are now considered a criminal network. See Jon Ward, *Nine MS-13 Members Held in Raid Anti-Mafia Law used to prosecute gangs*, WASH. TIMES (D.C.), Aug. 26, 2005, at B1.

38. *South American Import*, *supra* note 30.



across the United States.<sup>39</sup> Thus, the United States is greatly concerned with the activity of MS-13 and other transnational gangs.

Mara Salvatrucha's violence is no longer limited to the streets of Los Angeles. It may now be found in towns like Charlotte, North Carolina.<sup>40</sup> Edin Aldana, a member of Charlotte MS-13, shot and killed Jose Nuñez, a rival gang member, with a 20-gauge shot-gun.<sup>41</sup> The violence is not confined to gang culture. Pascuala Benítez Rodríguez, a 26 year old mother and co-owner of a local grocery store, was shot in the stomach and pronounced dead at the scene.<sup>42</sup> The Charlotte Police Department believes that MS-13 settled into the city within the past ten years.<sup>43</sup> Though gang violence affects everyday citizens, it is still predominantly confined to minority neighborhoods. Nevertheless, the United States continues to deport violent criminals.

Current U.S. policy and procedures convicts these tough, hardened criminals, and then deports them to their country of origin.<sup>44</sup> This policy is only superficially effective because it creates the misimpression that the United States is protecting its law abiding people from criminal aliens. However, this approach is controversial because, as former Senator Tom Hayden says, it is "like throwing our trash out the back door and letting them burn it."<sup>45</sup>

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39. *Id.*

40. WORLD MAGAZINE, *supra* note 13.

41. *Id.*

42. *Id.*

43. *Id.*

44. *South American Import*, *supra* note 30. Since 1998 El Salvador has received nearly 12,000 deportees with criminal records in the United States. Chris Kraul, *supra* note 6. Honduras claims that they have received 9,000 criminal deportees since 1998. Chris Kraul, *Honduran Sees Massacre as Warning; President Maduro says the bus attack may have been a message from gangs to back off his anti-crime crackdown*, L.A. TIMES, Dec. 27, 2004, at A3 [hereinafter *Honduran Massacre*].

45. Former Senator Hayden refers to a prison fire that claimed the lives of 105 inmates. The fire was blamed on faulty electrical wiring. One year prior, 68 died in what was at first believed to be a prison fire, but later discovered to be police guard shooting of the inmates at close range. Tom Hayden, *When Deportation is a Death Sentence; Sending U.S. gang members back to Honduras can amount to killing them*, L.A. TIMES, June 28, 2004, at B9.

*B. Mara Salvatrucha in El Salvador: 33,568 Homicides, Savage Crimes, and a Christmastime Bus Massacre*

Between 1994 and 1998, El Salvador suffered 33,568 homicides.<sup>46</sup> El Salvador reports that 34,000 gang members live within its borders,<sup>47</sup> and that gangs are responsible for 70% of all homicides.<sup>48</sup> This painful Salvadorian experience is unfathomable by merely speaking of statistics and percentages. In order to understand the crisis confronting the Salvadorian people, the randomness and ruthlessness of gang criminal activity must be examined. A simple description of the actions of gang members is enough to animalize these individuals, such that it explains why El Salvador is currently treating them like a social disease that must be exterminated. Their crimes show that they are unafraid of authorities and have no respect for human rights.<sup>49</sup>

For example, on July 5th, 2004 Edgardo Bonilla Solano, a seventeen year old private school student was shot to death as he exited school.<sup>50</sup> Two days later, eighteen year old private school student Luis Adilio Corena was killed by a gunshot wound to the chest.<sup>51</sup> These two deaths demonstrate that gang violence reaches everyone, including middle-class school children. Gangs hijack buses to carry out drive by shootings and rape girls as young as six years old.<sup>52</sup> In the town of Villanueva, gang members raped and killed a young teenage girl and her mother.<sup>53</sup> The gang members then hacked off the breast of the mother and daughter,<sup>54</sup> such an act of savagery cannot, under any circumstances, be tolerated. Gangs do not only victimize individuals; they also massacre innocent people for no apparent reason.

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46. This is an average of 6,714 homicides per year. José Miguel Cruz, Alvaro Trigueros Arguello, & Francisco González, *THE SOCIAL AND ECONOMIC FACTORS ASSOCIATED WITH VIOLENT CRIME IN EL SALVADOR* 18 (IUDOP-Universidad Centroamericana 1999) [hereinafter *SOCIAL AND ECONOMIC FACTORS*].

47. *El fenómeno de las maras crece y convulsiona a Centroamérica*, AGENCE FRANCE PRESSE, Aug. 10, 2004.

48. *Saca se anota victoria*, *supra* note 7.

49. In order to deliver a threat to government authorities in October 2004, a group of thugs, violators of human rights, gang-raped a teenage girl in her own home and in front of her mother. They then forced the mother to call the police as a way to show that they are not afraid of anyone. See Chris Kraul, *supra* note 6.

50. *Preocupan asesinatos de estudiantes a manos de pandilleros en El Salvador*, AGENCE FRANCE PRESSE, July 8, 2004.

51. *Id.*

52. *TIME MAGAZINE*, *supra* note 1.

53. *Id.* Villanueva is a shanty town outside of San Pedro Sula, Honduras.

54. In its article, Time magazine posted a warning reading, "Descriptions of violence in this story may upset some users." *Id.*

On December 23, 2004 gang members arbitrarily murdered twenty-eight innocent people.<sup>55</sup> Poor men, women, and children, aboard a bus on their way home from a day of Christmas shopping were pulled over by gang members near the slums of San Pedro Sula.<sup>56</sup> Seconds later the gang opened fire killing twenty-eight, including six innocent children.<sup>57</sup> Emilio López and his ten year old son, Emilio, Jr., were on that bus. The life of little Emilio was spared only because his father hid him under a seat; he escaped with only a bullet wound to the chest.<sup>58</sup> Unfortunately, his father was killed.<sup>59</sup> As Emilio, Jr. recovered in bed at the hospital he asked his mother about his father; she could not bear to tell him he was gone.<sup>60</sup> Emilio and his two siblings now face the extrajudicial life sentence of growing up without a father. Children like Emilio, Jr. are more likely to drop out of school and lead impoverished lives. They are likely to grow up angry and embittered and, perhaps join a rival gang to avenge their father's killing. Emilio, Jr. and all of the other victimized families spent Christmas day burying their loved ones.<sup>61</sup> As consolation, the Honduran government donated wooden caskets and \$550 to each family who lost a loved one.<sup>62</sup> The government wants to prevent this from becoming an ordinary day in Central America.

The stream of violent crime waged against ordinary people is seemingly endless. Yamil Hernández, a twenty-one year old bus fee collector, was killed when he refused to give gang members the day's receipts;<sup>63</sup> a teenage girl in San Salvador was stabbed in the neck, abdomen, and then

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55. This incident took place in San Pedro Sula, Honduras and not in El Salvador. However, the countries are experiencing the same violent crime situation and this incident accurately reflects the ruthlessness of gang crime. *Honduran Massacre*, *supra* note 44.

56. A note left at the scene of the attack was signed in the name of a long outdated revolutionary group, "Cinchonero People's Liberation Movement." However, Honduran officials dismiss the possibility of guerilla involvement. Rather, they believe it was either gang members hired by organized crime, or, and more plausible, Salvatrucha members carrying out a crime on 18th Street turf in a cat and mouse game of murderous one-upmanship. *Id.*

57. *The World; Honduras Arrests Two More Suspects; About 2,000 Soldiers comb the slums near San Pedro Sula for the gunmen who ambushed a bus. Families bury some of the 28 victims*, L.A. TIMES, Dec. 26, 2004, at A28 [hereinafter *Honduras Arrests Two More Suspects*].

58. *Honduran Massacre*, *supra* note 44.

59. *Id.*

60. *Id.*

61. *Honduras Arrests Two More Suspects*, *supra* note 57.

62. President Ricardo Maduro of Honduras also planned assistance for orphaned children. *Id.*

63. Chris Kraul, *supra* note 6.

beheaded;<sup>64</sup> a sixteen year old mother and her five-month-old daughter were killed by gang members.<sup>65</sup> Money extortion from residents and businesses in exchange for “protection” is ordinary.<sup>66</sup>

U.S. deportation directly leads to the victimization of thousands of Salvadorians. This crime wave consumes Guatemala,<sup>67</sup> Honduras,<sup>68</sup> the United States, Panama,<sup>69</sup> Costa Rica,<sup>70</sup> Mexico and Canada in a manner that the American public cannot comprehend. Central America’s homicide rates surpass those of all major U.S. cities. America’s policy must be modified to consider the effect that deportation will have on the deportee’s country of origin. The arbitrary deaths of Salvadorians is a grave violation of human rights; a violation that has its origins in the United States and which is yet to be condemned by the international community.

*C. A Comparative Analysis: Current Homicide Rates Versus  
the Civil War Death Toll, Other Central American  
Nations, and Major U.S. Cities*

Over a five year span between 1994 and 1998, El Salvador reported 33,568 homicides.<sup>71</sup> In the ten month period between July 1998 and May 1999, the government reported 3,875 homicides.<sup>72</sup> These figures produce a weighted average of 6,370 homicides per year.<sup>73</sup> Based on this average, El

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64. Homicide victims are found so mutilated that Spanish priests suspect that some gang members practice satanic rituals. *Id.*

65. *Id.*

66. *Id.*

67. Guatemala reports that they may have as many as 100,000 gang members in their country. *El fenómeno de las maras crece y convulsiona a Centroamérica*, *supra* note 47. Poor people are likely to participate in gangs; 75% of Guatemala’s people live in poverty. CIA FACTBOOK, *supra* note 15.

68. Honduras also reports that they may have as many as 100,000 gang members in their country. *El fenómeno de las maras crece y convulsiona a Centroamérica*, *supra* note 47. Gangs are likely to continue to flourish in Honduras. About 53% of their population lives in poverty. CIA FACTBOOK, *supra* note 15. However, some believe that the Honduran poverty rate is as high as 80%. Tom Hayden, *supra* note 45.

69. Panamá claims that it has been infiltrated by foreign gang members. *Regionwide campaign targets street gangs*, LATIN AMERICAN CARIBBEAN AND CENTRAL AMERICAN REPORT, July 20, 2004 (Intelligence Research, Ltd.) [hereinafter *Regionwide Campaign*].

70. Thought of as the tropical Switzerland of Latin America, Costa Rica complains that it now has 2,660 foreign gang members. *Id.*

71. SOCIAL AND ECONOMIC FACTORS, *supra* note 46 (this produces an average 6,714 homicides per year).

72. Approximately one third of these homicides took place in San Salvador, a city with 1.7 million inhabitants. Fiscalía General de la República, *supra* note 8; U.S. DEP’T. OF STATE, BUREAU OF W. HEMISPHERES AFF., *Background Note: El Salvador*, Sept. 2005, <http://www.state.gov/r/pa/ei/bgn/2033.htm> (this means that 4,650 homicides may be expected in a full year period).

73. Rather than simply averaging 6,714 and 4,650, this figure is computed by assigning a 5/6 value to 6,714, and a 1/6 value to 4,650. Thus, (5/6)(6,714) + (1/6)(4,650) = 6,370 homicides per year.

Salvador will suffer 76,440 homicides in a twelve year period.<sup>74</sup> This is 1,440 more than the official death toll attributed to the Civil War. Thus, more Salvadorians are dying today than during its bloodiest armed conflict.

Similarly, Honduras and Guatemala suffer from the same violent crime crisis. In the first half of 2004, Honduras recorded 1,580 homicides.<sup>75</sup> In the same period Guatemala recorded 2,000 homicides.<sup>76</sup> Based on these figures, Honduras and Guatemala will respectively suffer 3,160 and 4,000 annual homicides. These figures are extremely high in relation to their population size.<sup>77</sup>

The absurd Central American homicide rates are best illustrated when compared to those of major American cities. On January 1, 2004, Chicago was declared the murder capital of the United States.<sup>78</sup> In the year 2003, Chicago reported a total of 599 homicides, down from the previous years total of 648.<sup>79</sup> The Chicago urbanized area has a population of 6.8 million.<sup>80</sup> In contrast, between July 1998 and May 1999, a ten month period, San Salvador reported 1,122 homicides;<sup>81</sup> this figure can be prorated to 1,346 homicides for a full year period.<sup>82</sup> San Salvador's population is only 1.7 million.<sup>83</sup> Thus, Chicago would have to record 5,384 homicides in one year in order for the cities to have mathematically equivalent homicide rates (MEHR).<sup>84</sup> This is nearly nine times as many homicides as Chicago recorded in 2003.

74. The weighted average is multiplied by twelve years, the duration of the Civil War.

75. *El fenómeno de las maras crece y convulsiona a Centroamérica*, *supra* note 47.

76. *Id.*

77. Guatemala has a population of 14.3 million. Honduras has a population of 6.8 million. CIA FACTBOOK, *supra* note 15.

78. *Chicago is U.S. murder capital*, Jan. 1, 2004, at <http://www.cnn.com/2004/US/01/01/city.murders.ap/>.

79. *Id.*

80. Campbell Gibson, *Population of the 100 Largest Cities and Other Urban Places in the United States: 1790 to 1990*, Table B: *Population of the 20 Largest Cities and Urbanized Areas: 1990* (U.S. Census Bureau, Population Division Working Paper No. 27, 1998), available at <http://www.census.gov/population/www/documentation/twps0027.html>.

81. Fiscalía General de la República, *supra* note 8.

82. The simple calculation involves dividing 1,122 by 10 and multiplying the result by 12. This means there are 1,346 homicides in a population of 1.7 million during a one year period.

83. Fiscalía General de la República, *supra* note 8 (this corresponds to only 25% of Chicago's population).

84. 6.8 million divided by 1.7 million produces a factor of four. This means that for every 1.7 million residents of Chicago, there must be 1,346 homicides. Thus, multiplying 1,346 by four produces the MEHR, or 5,348 homicides.

Similar comparisons can be made to other major U.S. cities. In 2002, Baltimore reported 253 homicides;<sup>85</sup> Baltimore has an urban area population of 1.9 million.<sup>86</sup> Baltimore's MEHR is 1,504 homicides, or nearly five times its current figure. In 2003, New York City had less than 600 homicides;<sup>87</sup> the New York City urban area population is 16 million.<sup>88</sup> New York City's MEHR would require 12,668 homicides, or 21 times its current rate. In the first 9 months of 2004, Los Angeles reported 368 homicides;<sup>89</sup> the Los Angeles urban area population is 11.4 million.<sup>90</sup> Los Angeles' MEHR is 9,026, or 18 times its current rate.

The violent crime crisis in San Salvador far exceeds the rate of any major U.S. city in recent years.<sup>91</sup> It is unreasonable to expect that El Salvador, a third world country with limited resources and intelligence, can alone bear the brunt of dealing with a gang phenomenon that is headed in a worse direction than that of Brazilian favelas.<sup>92</sup> Pastor Ortiz, a regional director of criminal investigations in Honduras put it best when he stated, "If American police with all of their resources can't control the gangs in their cities, what can we do? We have nothing."<sup>93</sup>

#### IV. EL SALVADOR'S LEGAL CHESS MATCH

In 2003, El Salvador made its first official attempt to combat Mara Salvatrucha. Given the ruthless manner in which gang members violate the human rights of ordinary citizens and the threat of establishing a North-to-South America criminal network, the government felt it had a duty to enact special legislation to battle the problem.<sup>94</sup> However, its first attempt, Ley Anti Mara (LAM-1), was controversial and was attacked by domestic constitutional law and international law arguments. The Supreme

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85. *Baltimore's homicide rate climbs*, Jan. 1, 2004, <http://www.cnn.com/2004/US/South/01/01/baltimore.homicides.ap/>.

86. Campbell Gibson, *supra* note 80.

87. *Baltimore's homicide rate climbs*, *supra* note 85.

88. Campbell Gibson, *supra* note 80.

89. *Opponents: Jim Hahn's Raising the Homicide Rate*, LAVOICE, Sep. 8, 2004, <http://www.lavoice.org/article248.html> (this amounts to a prorated figure of 491 annual homicides).

90. Campbell Gibson, *supra* note 80.

91. In 1990, New York City hit an all time record of 2,245 homicides. See *Baltimore's homicide rate climbs*, *supra* note 85. This record pales in comparison to the mathematically equivalent homicide rate of 12,668.

92. Favelas are slums found predominantly in the Rio de Janeiro area. Brazilian police has been able to restrict violent crime to the favelas, whereas in El Salvador the crime is widespread. For a film based on a true story of gangs, drugs, poverty, and teens in Brazil, see *CITY OF GOD* (Miramax Studios 2002).

93. TIME MAGAZINE, *supra* note 1.

94. El Salvador's Constitution states that the *raison d'être* and ultimate goal of the State is to promote the common well being. CONSTITUCIÓN [Constitution] art. 1 (El Sal.) [hereinafter CONSTITUCIÓN].

Court of El Salvador ultimately struck down the law as unconstitutional. In response, the legislature passed a modified law, LAM-2. This strikingly similar law remains in force.

### *A. A Close Look at LAM-1*

LAM-1 is a temporary and punitive law which aims to curtail the violent activities of "maras" (gangs).<sup>95</sup> Generally, the law is applicable to people and children of all ages that are members of a mara and commit crimes enumerated under LAM-1 or the Penal Code.<sup>96</sup> A mara is loosely defined as an unlawful association that disrupts the public order, decorum or good customs of society, and that meet *some or all* of the following criteria: a group of people that (1) get together habitually, (2) mark off segments of territories as their own, (3) use signs or symbols as modes of identification, and (4) mark their bodies with scars or tattoos.<sup>97</sup>

The law is then implicitly divided into three groups. The procedural rights afforded to any given individual depend on his group classification. The first group consists of people *over the age of 18*, who are members of maras and commit a crime enumerated under this law or the penal code. The second group consists of people *between the ages of twelve and eighteen* who, upon the advice and solicitation of the Office of the Attorney General (Fiscalía General de la República), and with the approval of a juvenile judge, shall be treated as adults.<sup>98</sup> These first two groups must be processed according to the procedures contained in LAM-1.<sup>99</sup> Lastly, the third group consists of minors *between the ages of twelve and eighteen who may not be tried as adults* and any minor *under the age of twelve*. Minors under the age of twelve cannot be tried as adults; they are only subject to the provisions applicable to minors contained in LAM-1.<sup>100</sup> The law also exempts those citizens not falling within one of

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95. This purpose is stated in "Whereas III" and it is reiterated in article one. LAM-1, *supra* note 2, art. 1, para. 1. The law was meant to apply for a temporary period of 180 days. *Id.* art. 49.

96. *Id.* art. 1 & 2.

97. *Id.* art. 1, para. 2.

98. *Id.* art. 2, para. 1 & 3.

99. *Id.*

100. *Id.* art. 2, para. 5. These provisions include: (1) upon capture, immediate notification must be issued to the minor's parent or guardian, (2) the parent or guardian is entitled to accompany their child at all times during the process, (3) a minor may never be imprisoned with adults, (4) the right to a defense attorney, and (5) the right to assert

the three mentioned groups that commit crimes contemplated by LAM-1 or the Penal Code.<sup>101</sup>

The law then provides a laundry list of punishable activities for those that do fit within one of the three groups. For example, a gang member who frightens or harasses a person on neighborhood streets in a threatening manner;<sup>102</sup> those who fight in groups of two or more in a public setting;<sup>103</sup> those who ask for money or handouts from the general public;<sup>104</sup> those that communicate or identify themselves with maras by way of signs or tattoos are susceptible to a “60 day fine” (multa);<sup>105</sup> those carrying blades, knives, ice picks, or other blades used by artisans without justification;<sup>106</sup> those who form gangs in uninhabited or abandoned homes;<sup>107</sup> and, those who wander in residential communities or neighborhoods not their own without justification and identification.<sup>108</sup> Furthermore, the law also imposes obligations on people who are not gang members, namely arcade owners. Arcade owners who allow school children, whether uniformed or not, to play in their establishments during hours of study may be punished by a fine.<sup>109</sup>

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his or her rights pursuant to the Law of Juvenile Offenders (Ley del Menor Infractor). *Id.* art. 45.

101. LAM-1 repeats that in order to be punishable by this law, one must commit a crime listed in this law or the Penal Code *and* be a member of mara. This means that two people who commit the same crime, one being a member of a mara and the other one not, will be treated differently under the law. *Id.* art. 3, para. 2.

102. Note that this article does not require actual physical contact or harm to or with the victim. Nevertheless, such person is punishable by two to five years in jail. And, if the same crime is committed, but upon capture the gang member is found to be carrying any blade or knife, shank, flammable or explosive materials then he is punishable by two to six years in prison, even though he may not have brandished or used the weapon to consummate his crime. *Id.* art. 6, para. 1 & 2.

103. These gang members are punishable by two to three years in prison. *Id.* art. 7.

104. These gang members are punishable by two to three years in prison. If the same is committed but showing off tattoos or hand signs, or carrying objects such as chains, rocks, sticks or other damaging objects, then he or she is punishable by two to four years in prison. *Id.* art. 8.

105. A fine is quantified into days. It can be in the range of five to 365 days. Each day of fine is the equivalent to a regular workday at the legal minimum wage for employees of the commercial and service sector. *Id.* art. 4, para. 2. If a fine cannot be paid off it will convert to days of community service. One day of community service is four to eight hours per day. And if one cannot complete their days of community service then he or she shall be imprisoned. *Id.* art. 4 & 5.

106. These gang members are punishable by thirty to sixty days arrest. However, an exception is made for those carrying blades used in agriculture, so long as they are visible and holstered. *Id.* art. 16.

107. These gang members are punishable by thirty to sixty days arrest. *Id.* art. 19.

108. The gang members are punishable by a ten to twenty day fine. *Id.* art. 29, para. 1.

109. The owners of the arcades must pay a 20 day fine. *Id.* art. 23, para. 1.



*B. Arguments Before El Salvador's Supreme Court of  
Justice: The Unconstitutionality of LAM-1*

LAM-1 was ultimately declared unconstitutional just as it was set to expire in April, 2004.<sup>110</sup> Legal arguments were presented by Aldonov Frankeko Álvarez, Claudia Marlene Reyes Linares and José Heriberto Henríquez, and Beatrice Alamanni de Carrillo (Plaintiffs).<sup>111</sup> Collectively, they alleged that LAM-1 violated the Preamble and numerous articles of El Salvador's Constitution.<sup>112</sup> Specifically, Plaintiffs alleged that LAM-1 ignores the Constitutional Principle of Legality and Juridical Certainty (Principio de Legalidad y Certeza Jurídica),<sup>113</sup> Principle of Injury (Principio de Lesividad),<sup>114</sup> and the Principle of Culpability (Principio de Culpabilidad).<sup>115</sup> Plaintiffs also alleged that LAM-1 is unconstitutional because it violated the United Nations Convention on the Rights of the Child.<sup>116</sup>

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110. Ultimately, articles 1, 2, 3, 4, 6, 8, 9, 16, 18, 19, 23, 25, 27, 29, and 30 were unanimously declared unconstitutional in whole or in part. See Corte Suprema, *supra* note 11.

111. *Id.* at 181. Álvarez is a lawyer and notary from Santa Tecla; Reyes Linares is a nurse, Henríquez is an employee of San Salvador, and Alamanni de Carrillo is the Attorney General for the Defense of Human Rights.

112. Specifically, they allege LAM-1 violates the Preamble and articles 1, 2, 3, 6, 7, 8, 11, 12, 15, 27, 35, 193, and 246 of the Constitution. *Id.*

113. The Principle of Legality and Juridical Certainty are consecrated in article 15 and Article 1 of the Constitution, respectively. Article 15 states: No one may be tried unless in conformity with the laws promulgated before the commission of the alleged violation, and by tribunals previously established by law. Article 1 states: El Salvador recognizes the human being as the beginning and end of State activity, which is organized for the attainment of justice, judicial certainty and the common good. CONSTITUCIÓN, *supra* note 94.

114. The Principle of Injury is consecrated in Article 2, paragraph 1 of the Constitution. Article 2, paragraph one states: Every person has the right to life, physical and moral integrity, freedom, security, employment, property and possession, and to protection and defense for the conservation of such. CONSTITUCIÓN, *supra* note 94, art. 2, para. 1.

115. The Principle of Culpability is consecrated in Article 12 of the Constitution. Article 12 states: Every person who is charged with a crime shall be presumed innocent until proven guilty in conformity with the law and pursuant to a public trial, in which all of his necessary rights for defense shall be preserved. CONSTITUCIÓN, *supra* note 94, art. 12.

116. The Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 on November 20, 1989. The Convention has been ratified by 192 countries; only the United States and Somalia have not yet ratified the Convention. U.N. Convention on the Rights of the Child, adopted Nov. 20, 1989, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (entered into force September 2, 1990), available at <http://www.unicef.org/crc/crc.htm> [hereinafter CRC].

### 1. From the Perspective of El Salvador's Constitution

It is generally believed that the constitution places limits upon the lawmaker's authority to define a crime.<sup>117</sup> Lawmakers must adhere to the parameters established by the legal principle of juridical certainty. Juridical certainty can be characterized as the clear and precise definition of the law, prohibition of arbitrariness, and absence of retroactivity.<sup>118</sup> This principle serves to promote justice and equity.<sup>119</sup> Though there is substantial overlap between the principle of juridical certainty, injury, and culpability, LAM-1 explicitly violates each of them.

The principles of juridical certainty and injury punish individuals who infringe upon a clearly established legally protected interest of a third party. The principle of certainty aims to promulgate clearly written laws that protect clearly established legal interests. The principle of injury serves to immunize citizens from the reach of the law, except in cases where actual injury has been produced to a legally protected interest of a third party.<sup>120</sup> This means that a crime cannot consist of an attitude or an inner state of mind, but rather it must focus on observable actions or omissions, precisely defined by the law.<sup>121</sup> Only external actions are capable of producing adverse effects to third parties.<sup>122</sup> Thus, the principle of certainty serves to establish laws protecting a previously established legal interest.<sup>123</sup> If such legal interest is injured, then the injurer falls within the ambit of the law.

Article 1 of LAM-1 fails to adhere to the principle of juridical certainty. The article defines a gang as an illicit association of people that take actions that alter the public order, or the decorum or good customs of society.<sup>124</sup> However, it fails to define what is meant by the public order, decorum, or good customs of society. This ambiguity in the law prompted El Salvador's Supreme Court to state that, "with these expressions a lot is said and nothing is said."<sup>125</sup> In contrast, article 22A of El Salvador's

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117. *Nullum crimen sine culpa*, or no crime without culpability, is one limit. Corte Suprema, *supra* note 11, at 212.

118. See María Elena Lauroba Lacasa, *The Principle of Juridical Certainty and the Discontinuity of Law*, 63 LA. L. REV. 1241, 1241-42 (2003).

119. *Id.* at 1242.

120. For example, under U.S. tort law, the crime of battery seeks to protect individuals from unwanted physical contact. As a result, the American people are aware that touching others without their consent may result in civil prosecution. See RESTATEMENT (SECOND) OF TORTS § 13 cmt. d (1977).

121. Corte Suprema, *supra* note 11, at 282-83.

122. *Id.*

123. The Latin terms are *lex scripta*, *lex previa*, and *lex certa*. These principles promote previously existing written laws, clearly demarcating legally protected interests. See Corte Suprema, *supra* note 11, at 219-20.

124. LAM-1, *supra* note 2, art. 1.

125. Corte Suprema, *supra* note 11, at 284.

Penal Code defines organized crime in a manner that adheres to the principle of juridical certainty. Such crime is defined as a group of people dedicated to maintaining a hierarchical structure, with the purpose of planning and executing illegal actions for the final purpose of obtaining illegal goods and services or carrying out terrorist activity.<sup>126</sup> Article 22A of the Penal Code abides by the principle of juridical certainty because it clearly mentions hierarchical structure and illegal actions, including planning, execution, obtaining, realization of crimes, and the sensitive term "terrorist activity." Article 1 of LAM-1 is not written this clearly.<sup>127</sup>

Likewise, juridical certainty must protect clearly established legal interests. LAM-1 prohibits actions that do not cause injury to any clearly established legal interest. In fact, the law criminalizes and sanctions actions that do not cause injury to third parties. For example, those who identify themselves with gangs by means of signs or a tattoo are liable to "pay a fee" of sixty days.<sup>128</sup> The law also prohibits the gathering of gang members in abandoned or empty property,<sup>129</sup> loitering in cemeteries during nightfall,<sup>130</sup> the presence of minors at arcades or recreational centers during hours of study,<sup>131</sup> and wandering aimlessly in residential neighborhoods without justifiable cause and without personal identification.<sup>132</sup> Yet, none of these actions, when viewed objectively, cause injury to or endanger third parties.<sup>133</sup> They are legally irrelevant actions. Prohibiting these actions does not protect a legal interest of third parties.<sup>134</sup> This reasoning

126. *Id.*

127. Ultimately, article 1 of LAM-1 was struck down as unconstitutional. *Id.* at 319–21.

128. LAM-1, *supra* note 2, art. 18. This fee is in terms of days because to pay it off, a convicted gang member must pay the equivalent of one days wage at federal minimum wage. And, if a fee cannot be paid off, it shall be converted to public service, and failure to complete public service shall be converted into days behind bars. *Id.* art. 4 & 5.

129. These gang members are punishable by 30 to 60 days arrest. *Id.* art. 19.

130. These gang members are punishable by 10 to 30 days arrest. *Id.* art. 22.

131. This article states that those allowing gang members to play in their arcades or recreational centers shall be sanctioned with a fine equivalent to 10 to 20 days. Further, gang members caught at these recreational centers will be taken to the Salvadorian Institute for Childhood and Adolescent Development, and their parents to trial, who may be sanctioned with a five to ten day penalty. *Id.* art. 23.

132. These gang members may be sanctioned with a 10 to 20 day fine. *Id.* art. 29.

133. The same can be said of loitering in abandoned property or cemeteries or playing at arcades or recreational centers during hours of study. Corte Suprema, *supra* note 11 at, 285.

134. The Court stated that prohibition of tattoos and signs does not protect any legal

compelled the Supreme Court to declare articles 18, 19, 22, 23, and 29 of LAM-1 unconstitutional.<sup>135</sup>

The principle of culpability flows from the proper use of the principles of juridical certainty and injury. If the law is clearly written and only sanctions actions that injure a third party, then one is punishable under law so long as culpability for the injury can be established. Every accused criminal, or gang member, is presumed innocent until such culpability can be proven.<sup>136</sup> In the case of LAM-1, authorities may prosecute a group of teenagers found loitering in an abandoned property if they have tattoos and communicate by using signs or symbols. However, absent the tattoos or signs, the same group of teenagers cannot be prosecuted under LAM-1; they must be prosecuted under the Law of Juvenile Offenders. This dichotomy establishes LAM-1 as a discriminatory law. It assesses different penalties not on the seriousness of the crime, but rather on a way of life. Marking one's body with a tattoo is not a legally relevant action.<sup>137</sup> Accordingly, this non-injurious conduct leads to different treatment of individuals committing the same crime.<sup>138</sup>

The Salvadorian people are constitutionally protected from arbitrary discrimination by the laws under the principle of equality.<sup>139</sup> However, lawmakers may differentiate between two groups in society by enacting legislation,<sup>140</sup> so long as it is objective, reasonable and proportional.<sup>141</sup> The Supreme Court ultimately struck down the differentiation as unconstitutional, stating that, "It must not be forgotten that gangs constitute a serious problem that requires State intervention, so long as such intervention is subject to the principles of the constitution."<sup>142</sup>

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interest. *Id.*

135. Article 2 and the principle of injury served as the grounds for unconstitutionality. The lawmaker is not free to sanction actions that cause no injury to third parties. Rather, the lawmaker must take into consideration the injurious nature of the action. *Id.*

136. CONSTITUCIÓN, *supra* note 94, art. 12.

137. This must be contrasted with articles 9, 10, 11, 21, and 27 of LAM-1, which were deemed to not violate the Constitution, since they are more specific and enumerate unlawful actions, including the public consumption of drugs and rioting at sporting events. Corte Suprema, *supra* note 11, at 289.

138. Likewise, the three other irrelevant actions that may lead to differential treatment include habitual gatherings, marking off property, or identifying one self with signs or symbols. LAM-1, *supra* note 2, art. 1.

139. Article 3 of the Constitution states that all subjects are equal before the law. No differential treatment shall be based on race, sex, religion or nationality. CONSTITUCIÓN, *supra* note 94, art. 3.

140. Corte Suprema, *supra* note 11, at 225.

141. Normative differentiations are constitutional if there is a reasonable and objective purpose. This argument is rooted in article 246 of the constitution, which prohibits subsequent laws from altering the principles, rights, and obligations established by the constitution. *Id.*

142. *Id.* at 316.

## 2. From the Perspective of International Law

There are two essential international law arguments against LAM-1. First, and most importantly, LAM-1 fails to establish a minimum age below which a child is immune from the reach of the law. Secondly, the principles of equality before the law and the freedoms of expression and association are explicitly protected under international law.<sup>143</sup> Failure to comply with international law is tantamount to violating the Salvadorian Constitution.

Article 144 of the Constitution establishes the supremacy of international treaties signed and ratified by El Salvador. The Constitution states that, upon ratification, international treaties shall be the law of the Republic.<sup>144</sup> Domestic laws that contravene an international treaty violate the Constitution. Nevertheless, in the event that such a law is promulgated, the treaty shall control.<sup>145</sup> Consequently, the Constitution of El Salvador resolves any potential antinomies existing between international law and State sovereign law in favor of the former.<sup>146</sup>

Plaintiffs alleged that LAM-1 violates the United Nations Convention on the Rights of the Child (CRC).<sup>147</sup> The CRC requires that signatories establish an age floor below which a child shall be presumed incapable of infringing penal law.<sup>148</sup> LAM-1 violates the CRC because it states that children below twelve years of age who commit a crime enumerated

143. Articles II, IV, and XXII respectively. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, 9th Int'l Conference of American States, O.A.S. Official Record, OEA/Ser.L/V/II.23, doc.21 rev.6 (1948) [hereinafter American Declaration].

144. CONSTITUCIÓN, *supra* note 94, art. 144.

145. *Id.* art. 144, para. 2.

146. An antinomy is when there are two contradictory norms, often in the case of conflicting international law and sovereign state law. Though the Constitution of El Salvador establishes that treaties are supreme law and cannot be contravened by secondary law, it is generally believed that the antinomy is resolved in the opposite direction. According to the Hudson Lecture delivered before the American Society of International Law, State Sovereignty prevails in all but the most egregious instances of widespread human rights abuses. W. Michael Reisman, *The Manley O. Hudson Lecture: Why regime change is almost always a bad idea*, 98 AM. J. INT'L L. 516, 517 (2004). *Ley Anti Mara* is a flexible legal response aimed to curtail dangerous criminal conduct by a specific social group. It is not a law applicable to all, and is therefore not a widespread violation of human rights.

147. See Corte Suprema, *supra* note 11, at 234–42.

148. CRC, *supra* note 116, art. 40, para. 3(a). This policy aims to immunize children, given that due to their age and immaturity they are not likely to be able to discern the seriousness or illegality of their actions. Rather, the greater interest is to rehabilitate the young offenders and to reincorporate them as productive members of society. See CRC, *supra* note 116, pmb1.

under LAM-1 or the Penal Code, and are members of a gang, fall within the scope of the law.<sup>149</sup> Despite LAM-1's recognition that children deserve special procedures,<sup>150</sup> it fails to set an internationally required age floor. This contradiction between LAM-1 and the CRC is an antinomy; international law promotes a minimum age and LAM-1 attempts to prosecute all children without regard to age. This antinomy should be resolved syllogistically: LAM-1 conflicts with international law in force; international law is supreme over contradicting domestic law;<sup>151</sup> thus, LAM-1 is subordinate to the CRC. To reason otherwise would be unconstitutional.

Applying the same logic, it can be argued that LAM-1 violates the U.N. Convention on the Rights of the Child because it treats some children between the ages of twelve and eighteen as adults.<sup>152</sup> Under LAM-1, when a child between the ages of 12 and 18 is tried as an adult, there is no guarantee that the parents will be notified of the charges.<sup>153</sup> If such a child were convicted, he would be directly punishable and his parents would not be liable.<sup>154</sup> The CRC defines a child as every human being below the age of eighteen<sup>155</sup> and entitles children to the procedural safeguards of article 40, including the issuance of notice to his or her parents.<sup>156</sup> Thus, LAM-1 is a clear violation of the Convention on the Rights of the Child.

Strong international law arguments can be raised regarding the right to equality before the law. Under the American Declaration of the Rights and Duties of Man, all persons are equal before the law, without distinction as to race, sex, language, creed or any other factor.<sup>157</sup> This language is nearly identical to the language in article 3 of the Salvadorian Constitution, meaning that the same domestic legal arguments against discriminatory treatment under law apply under international law. As such, under international law, people may be subject to discriminatory

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149. LAM-1, *supra* note 2, art. 2, para. 5.

150. Under the CRC a child must: (1) be informed promptly of the charges against him, (2) have his parents or legal assistance in preparation of his defense, (3) to have the matter determined without delay, (4) to have any decision rendered against him reviewed by a higher authority. CRC, *supra* note 116, art. 40, para. 2(b). The legal process for children not tried as adults under LAM-1 complies with these provisions. LAM-1, *supra* note 2, art. 45.

151. CONSTITUCIÓN, *supra* note 94, art. 144.

152. LAM-1, *supra* note 2, art. 2, para. 3.

153. The general procedures of LAM-1 make no reference to the issue of notification to parents of minors whose child will be processed as an adult. *See Id.* art. 35-40.

154. Under procedures for minors of LAM-1, parents are liable for the payment of fines levied against their child. *Id.* art. 45(h).

155. CRC, *supra* note 116, art. 1.

156. *Id.* art. 40, para. 2(b).

157. American Declaration, *supra* note 143, art. II.

treatment under the law so long as it is objective, reasonable and proportional.

Likewise, the American Declaration provides that every person has the freedom of expression by any medium.<sup>158</sup> It can be argued that marking one's body with a tattoo or scar, or using signs and symbols as means of communication are expressions that are legally protected under international law. Similarly, the same Declaration provides that every person has the right to associate with others.<sup>159</sup> The gang, it may be argued, is a mode of association. The fact that a gang is likely to engage in criminal activity cannot and is not in itself sufficient to prosecute gang members *ex ante*. Membership in a gang, alone, is not a crime under international law. Rather, it is a permissible use of the freedom of association. Thus, in light of the foregoing, LAM-1 is arguably unlawful under international law.

### *C. The New Ley Anti Mara*

Perhaps in anticipation of the shortcomings of LAM-1, the legislature published a new version of Ley Anti Mara (LAM-2) on April 2, 2004.<sup>160</sup> The object of LAM-2 is to establish a special regimen to combat the delinquent activities of the unlawful groups known as *maras*, or gangs.<sup>161</sup> Though it is believed that LAM-2 may soon be declared unconstitutional, it will continue to operate until the Supreme Court renders a new decision.<sup>162</sup>

The Supreme Court of El Salvador is more likely to find that LAM-2 is constitutional because it is more precisely and clearly written than LAM-1. Many of the LAM-1 articles that were declared unconstitutional no longer appear or have been modified under LAM-2.<sup>163</sup> First, LAM-2 specifically states that in order to be considered a gang, *two or more*

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158. *Id.* art. IV.

159. *Id.* art. XXII.

160. LAM-2, *supra* note 12.

161. *Id.* art. 1.

162. If a citizen wants to contest LAM-2, he or she must bring forth another action before the Supreme Court. Alberto López, *CSJ: Es inconstitucional, Fallo contra ley antimara*, EL DIARIO DE HOY, Apr. 3, 2004, available at <http://www.elsalvador.com/noticias/2004/04/03/nacional/nac16.asp>.

163. Specifically, the Supreme Court declared unconstitutional articles 1.1, 1.2, 2.3, 2.5, 3, 4.8, 6.1, 6.2, 8.2, 9, 16, 18, 19, 22, 23, 25, 29.1, 29.2, and 30. In addition, articles 2.1, 2.2, 2.4, 4.1, 4.7, 5, 6.3, 6.5, 7, 8.1, 10-15, 16.2, 17, 20, 21, 24, 26, 28, 29.3, 31, and 49 were found *de facto* unconstitutional. Corte Suprema, *supra* note 11, at 319-21.

of the following criteria must be present:<sup>164</sup> (1) habitual gatherings, (2) unjustifiable and exclusive demarcation of territory *in relation to other gangs*, (3) use of signs or symbols as a mode of identification with the gang, and (4) the use of tattoos or scars to mark the body *to establish identification or membership* with the gang (emphasis added).<sup>165</sup> In contrast, LAM-1 only stated that *various* elements had to be satisfied. LAM-2 reduces this ambiguity by requiring only two elements to be present to establish that one is a gang member.<sup>166</sup>

LAM-2 also prohibits the demarcation of property in relation to other gangs, whereas LAM-1 simply prohibited demarcation of property. This is an attempt by the legislature to focus on the territorial turf rivalries that are second nature to gang life. Turf is commonly established by graffiti or zones of influence—areas where crime is predominantly committed by members of one gang. Additionally, whereas LAM-1 only stated that the use of tattoos or signs was one criterion in determining whether an individual is a gang member, LAM-2 only condemns the use of tattoos or scars *to establish identification or membership with a gang*. This new language is an effort by the legislature to focus on tattoos that are traditionally gang affiliated. Thus, under LAM-2, tattoos of a flag or surname are less likely to establish membership in a gang than the initials ‘MS’, the numbers 18 and 13, or a teardrop—a symbol that the gang member has previously killed.<sup>167</sup>

Secondly, LAM-2 states that if a crime enumerated under this law or the Penal Code is committed by a gang member, the accused will be subject to the Code of Penal Procedure or the Law of the Juvenile Offenders (whichever is applicable), subject to the modifications set out in this law.<sup>168</sup> This establishes procedural equality for gang members and ordinary citizens, thereby reducing the “arbitrary” differentiation that made the LAM-1 unconstitutional. Any differentiation or deprivation of fundamental liberties that remain can be objectively justified by reference to the Supreme Court’s acknowledgment that gangs pose a serious social problem that requires State intervention.<sup>169</sup>

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164. In contrast, LAM-1 ambiguously said that “various or all” of the criteria need be present to establish the existence of a gang. LAM-1, *supra* note 2, art. 1.

165. LAM-2, *supra* note 12, art. 3, para. 3. The changes in LAM-2 must be noted. By adding ‘*to establish identification or membership*’ and ‘*in relation to other gangs*’ the legislature narrowed the scope of the law.

166. Thus, it can be argued that LAM-2 satisfies the principle of juridical certainty.

167. Because this language was missing in LAM-1, it is possible that any tattoo found on two or more people may be gang affiliated. This could even include the all too common family surname tattoo. See LAM-1, *supra* note 2, art. 1.

168. LAM-2, *supra* note 12, art. 2 & 3.

169. Corte Suprema, *supra* note 11, at 318. The law must be flexible in order to address the current problems before it, even if it means abridging fundamental freedoms. For example, during the 1920s Red Scare, the U.S. Supreme Court prevented the spread



Thirdly, LAM-2 protects the public from gang members who demand money through intimidation or violence.<sup>170</sup> In comparison, LAM-1 prohibited anyone from soliciting money from others in an intimidating manner, and if the solicitor exhibited tattoos or signs the punishment would be greater.<sup>171</sup> Whereas under LAM-1 anyone soliciting money that had a tattoo could be accused of being a gang member, LAM-2 specifically requires that one be deemed a gang member before being subject to its procedures and punishments. Under LAM-2, having a tattoo is only one of the criteria that define gang membership.<sup>172</sup> Again, the legislature narrowed the scope of LAM-2, because it is aware of the constitutional violations embedded in the poor drafting of LAM-1.

Lastly, LAM-2 adheres to the Constitution because it complies with international treaties in force. Whereas LAM-1 violated the U.N. Convention on the Rights of the Child by allowing children of any age to fall within the scope of its provisions,<sup>173</sup> LAM-2 sets a minimum of twelve years of age. Currently, gang members under the age of twelve are immune from the reach of LAM-2. Now that the minimum age of twelve has been set, LAM-2 enforces the special protections provided to children under

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of Communist propaganda, stating that though freedom of speech is a fundamental right, it is not absolute. It must be restricted, particularly if done to prevent the state from political, economic, or moral injury, especially if such injury is *clear and imminent*. *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (Justice Holmes originally expounded the "clear and present danger" test in *Schenck v. United States*, 249 U.S. 47, 52 (1919)). In contrast, decades after the original Red Scare, the Supreme Court stated that free speech can only be abridged if it is *directed to inciting or producing imminent lawless action and is likely to incite or produce such action*. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). This flexibility set a standard that is harder to meet, and in *Brandenburg*, it allowed a Ku Klux Klan leader to state on national television, "Personally, I believe the nigger should be returned to Africa, the Jew to Israel," among other racially loaded speech, as they burned a cross and demonstrated firearms. *Id.* at 445-47. The Supreme Court found that there was no imminent danger in allowing this speech. Perhaps it forgot to consider then contemporary African-American struggles, including the Watts race riots (August 11-17, 1965), the assassinations of Malcolm X (February 21, 1965) and Martin Luther King Jr. (April 4, 1968), and the violent use of fire hoses and attack dogs to oppress African-Americans in America's southern states.

170. LAM-2, *supra* note 12, art. 7. Punishing an individual for soliciting money in an intimidating manner is justified by society's legal interest to be free from apprehensive contact from strangers. Thus, it may be argued that LAM-2 satisfies the principle of injury.

171. For someone that solicited money in an intimidating manner the jail sentence would range from two to three years. If that same person did it showing a tattoo, the punishment can be increased to four years. LAM-1, *supra* note 2, art. 8.

172. LAM-2, *supra* note 12, art. 3.

173. LAM-1, *supra* note 2, art. 2, para. 5.

international law.<sup>174</sup> Because LAM-2 complies with international law and amended the unconstitutional provisions of LAM-1, plaintiffs bringing action against LAM-2 are unlikely to succeed.

Nevertheless, arguments can still be raised against LAM-2. Article 3 of LAM-2 is particularly vulnerable because it lays out the elements that define a gang member. These elements remain largely the same as those in LAM-1, and the modifications made to the language may still lead to interpretations of juridical uncertainty. Furthermore, the aim of LAM-2 remains largely the same: to target the criminal activity of gangs. This could lead the Supreme Court to once again conclude that the law is discriminatory, and that there are no objective, reasonable, and proportional arguments advanced for the differential treatment of gang members and civilians.

#### *D. Legal Justification for Ley Anti Mara: The Obligations of Citizens and the Government*

Under El Salvador's Constitution and international law, the citizens and government of El Salvador must perform certain duties in relation to each other and individually. El Salvador and its citizens constantly engage in a symbiotic relationship; El Salvador must enact legislation that promotes the constitutionally protected freedoms of its people, and the citizens must behave lawfully to their country and each other. From this perspective, the fulfillment of duty by each individual is a prerequisite to the rights of all.<sup>175</sup>

Under domestic law, the Constitution recognizes that the primary objective of the State is to promote justice, juridical security, and the well being of society.<sup>176</sup> The State is obliged to procure the enjoyment of freedom, health, culture, economic well being, and social justice for each of its citizens.<sup>177</sup> Given these objectives and obligations of the State, El Salvador must choose between promoting the constitutional and human rights of gang members and securing the safety, well being, and liberties of the innocent victims.<sup>178</sup> In essence, this is a balancing scale which should tip in favor of El Salvador's innocent citizens, given that they vastly outnumber the criminal gang members. According to Article 2 of the Constitution, every person has the right to life, physical and

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174. CRC, *supra* note 116, art. 40, para. 3(a).

175. American Declaration, *supra* note 143, pmbl.

176. CONSTITUCIÓN, *supra* note 94, art. 1.1.

177. *Id.* art. 1.3.

178. The exact number of gang members within the borders of El Salvador is unknown. However, the population of El Salvador is 6.5 million. CIA FACTBOOK, *supra* note 15.

moral integrity, security, and protection from violations against those rights. Should El Salvador fail to protect these fundamental rights for its innocent people, it would be in breach of the fundamental principles underlying its constitution.

International law obligates citizens, including gang members, to perform certain duties. First, each individual has a duty to conduct himself in relation to others such that each and every person may fully form and develop his personality.<sup>179</sup> Gang members breach this duty when they kill and rape innocent children.<sup>180</sup> El Salvador, as a unified nation, needs to protect these innocent children from being deprived of a fair opportunity to enjoy their constitutional guarantee to life and personal development. Second, every person has a duty to obey the law and other legitimate commands of his country.<sup>181</sup> The law is that one shall not deprive another of life, or their enjoyment thereof. Again, gang members breach this duty when they kill innocent people. As a result of these breaches, the fundamental rights of gang members should be severely compromised, even at the risk of violating international human rights law and constitutional law.<sup>182</sup> It would not be just if El Salvador idly watched thousands of innocent people die each year from senseless crime; to do so would be an egregious violation of human rights.

*E. Moral Justification for LAM and the Will of the People:  
Vehement Emotional Approval*

Lost behind the legal tug-of-war between human rights activists and the legislature are justice and the public opinion of the Salvadorian people. To understand the sentiment of Salvadorians, it is essential to understand the nature of the problem. A report prepared for the World Bank put it best when it stated that, "It appears that we are dealing here with common, poor people who are robbing other poor people."<sup>183</sup> Crimes occur at night clubs, schools, shopping centers, buses, and most

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179. American Declaration, *supra* note 143, art. XXIX.

180. It is essential to remember Edgardo Bonilla Solano, Luis Adilio Corena, as well as all of the other innocent people killed by senseless gang crime. *Preocupan asesinatos de estudiantes a manos de pandilleros en El Salvador*, *supra* note 50.

181. American Declaration, *supra* note 143, art. XXXIII.

182. The rights of man are limited by the rights of others, by the security of all, and the general welfare. *Id.* art. XXVIII.

183. Survey results indicate that 27.4% of victims suffered losses between \$17-57. 14.2% lost between \$57-114, and 19.9% lost between \$114-570. SOCIAL AND ECONOMIC FACTORS, *supra* note 46, at 32.

frequently, on public streets.<sup>184</sup> Consequently, 50% of Salvadorians are concerned that they may at some time fall victim to senseless crime.<sup>185</sup> When Salvadorians were asked to rate on a scale of one to ten how worried they are about the general level of insecurity in the nation, 48% responded between seven and ten.<sup>186</sup> The people understand that the law must be flexible, even if it means employing repressive means.

President Tony Saca of El Salvador currently has an approval rating of 80%.<sup>187</sup> This is largely due to his decision to continue the tough domestic criminal policy initiated by former President Francisco Flores. Rafael Guardado, a mechanic from the impoverished community of Ilopango, said in reference to LAM, "It's working, and they should tighten it even more. Bring in the army to patrol too."<sup>188</sup> The people approve of what the government is doing. In fact, they want the government to do more. If the government does not take action then the situation may worsen.

The citizens of El Salvador have been known to disfavor human rights activists and support vigilante death squads that take matters into their own hands.<sup>189</sup> Salvadorians believe that human rights groups that levy sanctions against the country only serve to protect the criminals.<sup>190</sup> The people state that, "The actions of murderers, kidnappers, thieves, rapists, and gang members whom no one has been able to control [were] . . . more illegal and inhuman than the death squad."<sup>191</sup> As a result, "many of the vigilantes are simply local men pushed too far by the gang-bangers' reign of terror,"<sup>192</sup> and it is generally believed that "the only way to deal

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184. Surveys indicate that 34.7% of attacks take place on public streets. *Id.*

185. Jeannette Aguilar, *La mano dura y las "políticas" de seguridad (Firm hand and the politics of public safety)*, 667 ESTUDIOS CENTROAMERICANOS 446 (May 2004).

186. This question was asked of Salvadorians in 2002; an answer between 7-10 corresponds to a level "substantial insecurity" that they may one day be victims of crime. *Id.*

187. Chris Kraul, *supra* note 6.

188. *Id.* It can be assumed that Guardado, as a mechanic, leads a lower middle class standard of living. There is no just reason why he and his family should be living in fear. Guardado exemplifies that just because one is poor, does not mean that one should be a criminal.

189. Lawrence Michael Ladutke, *Expressions For and Against the Vigilante Death Squad Sombra Negra*, 8 SW. J. L. & TRADE AM. 283, 299 (2001-2002).

190. In a 1995 survey conducted by IUDOP, 61.2% of Salvadorians agreed with the statement "Human rights favor criminals and thus they cannot be done away with." 43.1% agreed with the claim that "Human rights organizations only seek to protect criminals." *Id.* at 297.

191. *Id.* at 299. The Sombra Negra (Black Shadow) Death Squad took matters into its own hands by employing a distinctive *modus operandi*. It focused on accused criminals who were released by judges due to lack of evidence. This implies that Sombra Negra selected its targets based on the theory that human rights protect criminals. The Sombra Negra would shoot the accused criminal in the back of the head at close range. The bullet would pass through the skull, destroy his or her face, and thus impede identification of the body. *Id.* at 288-89.

192. TIME MAGAZINE, *supra* note 1.

with the gangs is to kill them all.”<sup>193</sup> In order to prevent good versus evil chaos, El Salvador must be accorded a substantial degree of immunity from the accusations of human rights organizations. In fact, these human rights organizations should side with the Salvadorian people and let them know that they do not support gang members and their unjustifiable, cruel, and unnecessary torture. Otherwise, sanctions will not take away the unjustifiable fear that the people of El Salvador feel.<sup>194</sup>

*F. Violent Crime Statistics: Manufacturing Consent or Accurately Reporting the Situation?*

The Salvadorian public supports LAM and wants the violent crime wave to end. However, because not all Salvadorians are victims of crime, many formulate their opinions largely based on media press releases and statistics concerning the crime crisis. As such, it is vital to examine the accuracy of statistics.

A confused public is a scared public. Two newspaper articles published within three weeks of each other drastically disagree on the number of gang members living in Central America. The first article, published on August 10, 2004, states that El Salvador, Guatemala, and Honduras respectively have 34,000, 100,000, and 100,000 gang members living within their borders.<sup>195</sup> In contrast, the second article states that El Salvador, Guatemala, and Honduras respectively have 10,500, 14,000, 36,000 gang members.<sup>196</sup> Some believe that this discrepancy is merely an effort by incumbent politicians to win elections and manufacture high approval ratings.<sup>197</sup> In fact, between the year 2000 and 2002, the homicide rate in El Salvador declined by 13.5%, yet the National Republican Alliance (ARENA) promised a “super firm hand” attack on criminal delinquency.<sup>198</sup> Nevertheless, the people of El Salvador, scared

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193. *Id.*

194. On June 4, 2004, the United Nations asked El Salvador to abolish LAM-1 as violative of the Convention on the Rights of the Child. However, the UN offered no alternate means or aid to remedy the situation. Juan José Dalton, *ONU pide abolir Ley Antimaras*, LA OPINIÓN, June 7, 2004, at 8A.

195. *El fenómeno de las maras crece y convulsiona a Centroamérica*, *supra* note 47.

196. *Regionwide Campaign*, *supra* note 69.

197. Jeannette Aguilar, *supra* note 185, at 446–47.

198. Between 2000 and 2002 homicides declined from 2,341 to 2,024, and “delitos” (felonies and misdemeanors) declined from 61,545 to 30,654, a 50.2% drop. *Id.* ARENA (National Republican Alliance) is El Salvador’s right wing political party. It has been in continuous power for the last 20 years and is a close ally to President George W. Bush’s administration. See Joe Rubin, *El Salvador: Payback*, FRONTLINE WORLD,

that crime may reach them, continue to approve LAM and want more to be done.

## V. SUGGESTIONS FOR THE UNITED STATES AND EL SALVADOR: LAM IS THE BEGINNING, NOT THE SOLUTION

LAM is an important *beginning* to remedy the serious crime problem. Gangs cannot be allowed to run rampant throughout North and Central America. However, this does not solve the unconstitutionality of LAM-1, or the concerns of human rights activists.<sup>199</sup> The United States and El Salvador must work together to control Mara Salvatrucha. It is in their best interest to do so.

### A. U.S.: Stop the Deportation of Gang Members

The United States should no longer shift the burden of combating Mara Salvatrucha to El Salvador. Continued deportation is a threat to hemispheric and national security. To minimize the threat, the United States should lend financial, law enforcement, and intelligence assistance to Salvadorian agencies attempting to control the gang.

The deportation of Salvadorian-American Mara Salvatrucha members to Central America is an irrational policy. The Central American republics are laden with poverty<sup>200</sup> and have histories of armed conflict.<sup>201</sup> The broken family structures, violent childhoods, abject poverty, and large black market of left over war caliber weapons that allow MS-13 to flourish in El Salvador exist throughout Central America. Deportation places Mara Salvatrucha in a position to arm itself, recruit thousands of new members, establish cells across international borders, and kill thousands of innocent victims. It should be no surprise that Mara Salvatrucha is now a threat in Honduras, Guatemala, Panamá, Costa Rica, and Mexico.<sup>202</sup>

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Oct. 12, 2004, <http://www.pbs.org/frontlineworld/elections/elsalvador/>.

199. The main concern of human rights activists is that LAM is merely repressive and fails to attack the root social causes—family disintegration and joblessness. Chris Kraul, *supra* note 6.

200. According to CIA sources, 18% of Costa Ricans, 36% of Salvadorians, 37% of Panamanians, 50% of Nicaraguans, 53% of Hondurans, and 75% of Guatemalans are poor. CIA FACTBOOK, *supra* note 15. However, other sources indicate even higher poverty rates: Honduras as high as 80%. Tom Hayden, *supra* note 45. El Salvador as high as 43%. <http://www.care.org.sv/indicadores.htm>.

201. Panamá was invaded by the U.S. in 1989, resulting in the expulsion of Manuel Noriega. Guatemala put an official end to its 36 year internal conflict in 1996. In Nicaragua, the left wing Sandinistas rose to power. Throughout the 1980s they fought U.S. sponsored anti-Sandinista contras. El Salvador put an end to its twelve year civil war in 1992. CIA FACTBOOK, *supra* note 15.

202. According to the Center for Investigation and National Security (CISEN),

El Salvador is incapable of containing Mara Salvatrucha. Prisons are already overcrowded and rival gang members cannot be housed in separate facilities. The country lacks the financial resources and patience to do this. The police are overburdened with common crime and cannot contain the gang. The judicial system, with pressures from abroad, has not favored necessary legislation aimed to curtail gang activity. It is unreasonable to ask that El Salvador humanely deal with inhumane gang members. El Salvador must protect its people, especially the hard working, humble people who are just trying to keep pace with the increasingly difficult life in a nation eternally condemned to third world status. It is unreasonable that Mara Salvatrucha continue to terrorize and destabilize Central America. As the leader of the War on Terror, the United States should reconsider its flawed policy of exporting Salvadorian-American gangs outside its borders.

Deported gang members pose a greater threat to American national security than those confined within its borders. Mara Salvatrucha cannot be entirely deported because many members are either U.S. born Latinos, or African-American; this assures that Mara Salvatrucha will always exist in the United States. These members are often convicted of criminal charges that pose little or no risk to the American population at large. In contrast, deported MS-13 members established a network of gang cells stretching from Panamá to the United States. This chain is a threat to national security because it can be used to smuggle automobiles, drugs, war caliber weapons, and humans via the Pacific and Atlantic Oceans. In fact, U.S. intelligence already believes that Al Qaeda has met with Mara Salvatrucha.<sup>203</sup> One concern is that Al Qaeda may use MS-13 as a courier from Central America to the U.S.-Mexico border, where illegal entry into the United States will be inevitable.<sup>204</sup> Thus, the current

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Mara Salvatrucha, as it searches for new routes to the U.S. via Mexico, may now be found in 24 of the Mexican states. Luis Enrique Pacheco, *Extienden 'maras' redes en Mexico*, EL NORTE (MEX.), July 18, 2005.

203. Adm. James Loy, former Department of Homeland Security deputy secretary, told the Senate Select Committee on Intelligence in February that, "recent information from ongoing investigations strongly suggests that al Qaeda has considered using the southwestern border to infiltrate the United States." He also suggested that al Qaeda terrorists may have targeted Mara Salvatrucha's illegal-alien smuggling operations to gain entry to this country. Jerry Seper, *2 Iraqis held trying to cross Mexico border Paid to enter U.S. illegally*, WASH. TIMES (D.C.), June 30, 2005, at A01.

204. Loy testified that al Qaeda operatives believe they can pay to get into the country through Mexico and that entering illegally was "more advantageous than legal entry." *Id.* However, others state that the only thing in common between Mara

deportation policy should be changed because, as former INS media director Russ Bergeron stated, "We have a fundamental obligation to protect our American citizens from the threat posed by gang violence."<sup>205</sup> In reality, current policy has done just the opposite by increasing the threat that Al Qaeda may enter illegally into the United States.

To remedy this situation, the United States must take affirmative steps to assist and cooperate with the Central American Republics as they attempt to contain Mara Salvatrucha.<sup>206</sup> The United States must consider granting financial aid to El Salvador. To receive this aid, El Salvador's use of the money must be conditioned on two grounds. First, El Salvador must build new detention facilities that will house convicted criminals in humane conditions. Second, El Salvador must create programs aimed at combating the root causes of gang membership. The United States should also consider training El Salvador's law enforcement and intelligence agencies in the same manner that they train Salvadorian troops to continue the war in Iraq.<sup>207</sup> Much like terrorism, international cooperation is required to solve an international gang problem. An affirmative role by the United States in combating Mara Salvatrucha would make the claim that it is the leader of the War on Terror credible.

*B. Suggestions to El Salvador: Reincorporate Gang Members into Society; Reform Economic Policy*

Luis Rodríguez, a former gang member, states in a *New York Times* article, "They wanted to be incorporated into the country, to be allowed to rebuild, to learn skills, to make decisions about bettering their communities and to stop being harassed or beaten by the police and attacked by death squads."<sup>208</sup> Along with LAM, El Salvador must address the root factors that lead young people to join gangs. Many children born in the 1970s and 1980s experienced abject poverty, broken

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Salvatrucha and al Qaeda is that both were created by the United States. Luis Rodríguez, *A Gang of Our Own Making*, N.Y. TIMES, Mar. 28, 2005, at A17.

205. TIME MAGAZINE, *supra* note 1.

206. The presidents of El Salvador, Honduras, Nicaragua, and Guatemala recently met in Tegucigalpa to discuss means by which to combat gangs. The United States failed to attend this meeting. Chris Kraul, Robert López, & Rich Connell, *4 Presidents Seek Help in Gang Battle; Central American leaders say the groups pose a hemispheric threat, augmented by U.S. deportation of criminals*, L.A. TIMES, Apr. 2, 2005, at A3.

207. Salvadorian troops are trained by Spain, a U.S. ally in the Iraq war. Salvadorian troops are sent to fight in Southern Iraq. *Centroamérica envía más tropas a Irak*, LA OPINIÓN, Feb. 2, 2004, at 3A. El Salvador, one of the 4 poorest and most violent nations in the western hemisphere, is the only Iberian American nation participating in the Iraq war. Juan José Dalton, *Rice reitera la alianza de EU con El Salvador*, LA OPINIÓN, May 1, 2005, at 1A.

208. Luis Rodríguez, *supra* note 204.



homes, and violent childhoods. These traumatic backgrounds resurface when they are suddenly deported to El Salvador, a country that has not significantly progressed since the end of the Civil War. The country must create programs that address these problems to comply with the concerns of human rights organizations.

One way to combat the root causes of gang membership is to initiate rehabilitative programs whose purpose is to reincorporate gang members into Salvadorian society. Such programs should teach deportees to speak, read, and write Spanish in a proficient manner.<sup>209</sup> This will increase a deportee's ability to adapt to his new society. Gang members should also be provided with alternatives to gang life, including: education, music, art, youth sports, and trades that may allow them to economically survive in society. The essence of these programs is to offer economic participation or better yet, some meaning to each gang member's daily existence in this world. Gang members, in turn, should be offered opportunities that will enable them to exploit the English that they learned in the United States. These individuals could be used to initiate a national program of compulsory public English language education for every Salvadorian citizen. This would be consistent with the current role that Salvadorians play in the United States: Salvadorians spend American dollars,<sup>210</sup> produce American products,<sup>211</sup> and fight American wars;<sup>212</sup> English language education will make them bilingual and more adept at participating in the growing global economy.<sup>213</sup> This is one way in which the nation may begin to see signs of structural progress, so that

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209. Many deportees left El Salvador as children and never learned Spanish. Manuel López, 34, was taken to the United States when he was just thirteen days old. He was deported to El Salvador after serving time in San Quentin for allegedly killing two black males as they raped his mother. His first learned words in Spanish were, "some change please?" He is now a vagrant in the streets of San Salvador. *Un día en la vida de Manuel López*, LA OPINIÓN, Apr. 12, 2004, at 8A.

210. Beginning January 2001, El Salvador approved the "Monetary Integration Law" (Ley de Integración Monetaria), which made the U.S. Dollar the official legal tender alongside the Colón. Colones are no longer printed and are only used in remote rural areas. The economy, in effect, has been dollarized. *Background Note: El Salvador*, *supra* note 72.

211. Exploited Salvadorian laborers assemble some of the most popular product sold in the U.S. These include Kohl's, GAP, Liz Claiborne, and Nike. Steven Greenhouse, *Labor Abuses in El Salvador are Detailed in Report*, N.Y. TIMES, May 10, 2001, at A12.

212. Despite general disapproval from the people of El Salvador, George W. Bush ally ARENA joined the U.S. led coalition in the war on Iraq. See Joe Rubin, *supra* note 198.

213. The knowledge of English may help Salvadorians obtain business immigrant visas to the United States as professionals, multinational executives or managers, professors, researchers, and skilled workers.

perhaps twenty years into the future, politicians will accurately be able to say that the people of El Salvador are much better off.<sup>214</sup>

To improve El Salvador there must be a national commitment to the people, culture, and identity. Such a process should occur over time, by slowly enacting national economic policies that favor the masses. This would require the nation to liberate itself from the imperialist mandate of developed nations.<sup>215</sup> Nevertheless, El Salvador's ARENA controlled government continues to accept foreign initiated policies that perpetuate poverty.<sup>216</sup>

Two recent ARENA decisions may ultimately further push Salvadorians into a state of dependence on the United States. First, ARENA enacted the Monetary Integration Law (*Ley de Integración Monetaria*) which officially established the U.S. dollar as the official currency of El Salvador. This upset many critics, who argued that it will once again bring

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214. Because El Salvador has not been in mainstream public eye of the United States, it is easy for politicians to mislead the general public with exaggerated and inaccurate statements. Since 1989 El Salvador has been solely controlled by the right wing ARENA governments. In the last twenty years, the poverty rates have not changed and a low standard of living has persisted. El Salvador is equally worse off today as it was in 1980, the year the civil war commenced. Nevertheless, in the 2004 Vice Presidential debate, Dick Cheney incorrectly stated that, "As a result of U.S. intervention and the liberating force of freedom, El Salvador and its people are much better off today than in 1984." Transcript Part I: Cheney, Edwards spar over Iraq policies, available at <http://www.cnn.com/2004/ALLPOLITICS/10/05/debate.transcript/index.html> (last visited July 26, 2005).

215. To do so is nearly impossible. In the 2004 Presidential elections, the people were almost certain to elect Schafik Handal, the left wing FMLN candidate. An FMLN victory would have almost guaranteed El Salvador's rejection of the Central American Free Trade Agreement (CAFTA). This made the Bush administration nervous, to the extent that they warned the voters of the impact that a left wing government would have on Salvadorian-U.S. relations. The warning was really a veiled threat to revoke temporary worker visas (TPS), resulting in deportation, and putting an end to El Salvador's largest source of Gross Domestic Product: remittances. Thus, elections in El Salvador are better described as coerced rather than free. In the end, the people voted for the right wing candidate, extending ARENA's recent domination of the Salvadorian presidency. Joe Rubin, *supra* note 198. In 2004, remittances accounted for 16.2% of El Salvador's GDP. BANCO CENTRAL DE RESERVA DE EL SALVADOR (CENTRAL RESERVE BANK OF EL SALVADOR), *Comunicado de Prensa No. 1/2005*, Jan. 13, 2005, available at [http://www.bcr.gob.sv/publicaciones/main\\_comunicado12005.html](http://www.bcr.gob.sv/publicaciones/main_comunicado12005.html).

216. Poverty in El Salvador is perpetual. It has a Gini Index of .53. The index is a measure of the inequality in the distribution income in a country. The index is calculated from the Lorenz curve, in which cumulative family income is plotted against the number of families arranged from the poorest to the richest. The index is the ratio of (a) the area between a country's Lorenz curve and the 45 degree helping line to (b) the entire triangular area under the 45 degree line. The more nearly equal a country's income distribution, the closer its Lorenz curve to the 45 degree line and the lower its Gini index. Conversely, the more unequal a country's income distribution, the farther its Lorenz Curve from the 45 degree line and the higher its Gini index. If income were distributed with perfect equality, the Lorenz curve would coincide with the 45 degree line and the index would be zero. CIA FACTBOOK, *supra* note 15. The average Gini for Latin America is .49, fifteen points higher than either industrialized nations or countries of Southeast Asia. PATRICE FRANKO, *THE PUZZLE OF LATIN AMERICAN ECONOMIC DEVELOPMENT* 325 (1st ed. 1999).

economic hardship to the people since there is no practical way to accurately exchange the currency.<sup>217</sup> Meanwhile, the federal minimum wage set at \$1,320 year, or \$110 per month, continues to lag behind El Salvador's rapidly rising cost of living.<sup>218</sup> All this economic instability prompted one radio commentator to say, "El Salvador has almost simultaneously suffered three earthquakes; the one on January 13, a 7.6, the one on February 13, a 6.1, and Dollarization, an 8.75."<sup>219</sup> The people of El Salvador believe that the decision to dollarize is a policy that strengthens the American dollar at the expense of the Salvadorian economy.<sup>220</sup> It is this type of policy that buttresses the arguments of human rights activists, namely, that El Salvador is merely trying to repress the situation and not engage in long term structural and positive change.

Secondly, the ARENA controlled government recently ratified the Central American Free Trade Agreement (CAFTA). Many already oppose CAFTA because it will make El Salvador increasingly vulnerable to the pressures of the Maquila industry. By expanding the free trade zone to Central America, more U.S. corporations will take advantage of its unskilled labor pool. Given that 50% of the population lives in poverty stricken conditions, employment at a maquila is a viable *short term* option. It is not a *long term* option because maquila wages do not keep up with the

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217. It is believed that due to the rounding off of cents, the people that will suffer most are those of scarcest resources. *Dolarización: un terremoto desintegrador (I)*, LA INSIGNIA, Mar. 22, 2001, available at [http://www.lainsignia.org/2001/marzo/econ\\_016.htm](http://www.lainsignia.org/2001/marzo/econ_016.htm) [hereinafter LA INSIGNIA]. For example, a cab fee of 1.50 Colones (.17 USD) would be paid in the amount of .20 USD (that is 1.75 Colones). This represents over a 16.7% increase in the price in Colones. In return, the government decided to fix fares at .17 USD, exactly 1.49 Colones. Thus, cab drivers lose .01 colones per fare. *Dolarización: un experimento desafortunado*, 934 EL SALVADOR PROCESO 6, 6-7 (Jan. 10, 2001).

218. The rising cost of living can predominantly be attributed to market forces. Salvadorians spend over \$2 billion of remittance money per year. It is spent mostly on consumer goods at newly built malls and motorcycle stores, thereby creating greater demand and leading to general price increases. However, the poorest people or those not having family members abroad suffer most. Their income has not increased, yet they too must pay the higher cost of consumption. See Joe Rubin, *supra* note 198; see also Agustín Durán, *Instan a Salvadoreños a Aprovechar el TPS*, LA OPINIÓN, Jan. 22, 2005.

219. The radio commentator refers to the January 13, 2001 earthquake of magnitude 7.6. Exactly one month later, it registered a 6.1 quake. Prior to dollarizing, the dollar to colon exchange rate was 8.75. LA INSIGNIA, *supra* note 217.

220. Some hold that the Dollarization of El Salvador corresponds to an economic interest of the United States: to unify commerce and the Latin American economy in order to strengthen the U.S. dollar so that it may successfully compete against the Euro. *Id.* Over the past two years the Euro has continued to outperform the dollar. In March 2003 one Euro equaled \$1.06. In March 2005 one Euro equaled \$1.33. See <http://finance.yahoo.com/q?s=EURUSD=X> (click 'Basic Chart', set to 2 year range).

high cost of living. This may lead people to once again become desperate and revert to crime, drug trafficking, and potentially, armed conflict. The historical existence of economically desperate situations led to the peasant uprising of 1932 and the twelve year long civil war.<sup>221</sup> From this perspective, it is essential to question whether gang proliferation is really just another side effect of a poor distribution of wealth and a horribly run economy.

## VI. CONCLUSION

Mara Salvatrucha is real, threatening, and merits international cooperation between the United States and El Salvador. Gang members cannot be allowed to control the country; they cannot put the citizens in fear. International human rights cannot be extended so far as to preclude El Salvador from ratifying laws to protect ordinary, hard working people. Nevertheless, El Salvador and the United States should invest in economic, social, and educational programs. Without addressing the root causes of gang membership—poverty in El Salvador and marginalization and inner city violence in the United States—both nations should expect some Salvadorian youth to continue to join the gangs. One gang member put it best, “The gang is my life . . . in it I feel good. It’s the only thing I’ve ever had in this stinking world.”<sup>222</sup> Without a national commitment to its people and foreign monetary assistance to invest in economic, educational, and social programs, El Salvador will continue to be a “stinking world.” It can hardly expect the gang members to give up the one thing in the world that they feel good about.

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221. Tired and frustrated of the exploitation of campesinos (peasants) by the landed coffee plantation aristocracy, Farabundo Martí, a university educated bourgeoisie, led the uprising which resulted in the killing of over 30,000 campesinos by Salvadorian and United States forces. The FMLN, El Salvador’s left wing political party is named in commemoration of Farabundo Martí. See generally THOMAS P. ANDERSON, MATANZA: EL SALVADOR’S COMMUNIST REVOLT OF 1932 (1971).

222. Gonzalo Egremy, *Los múltiplos de la mara salvatrucha*, LA PRENSA GRÁFICA, June 12, 2002, <http://archive.laprensa.com.sv/20021206/dept15/dep15-1.asp>.